In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-783

CHRISTOPHER MARTELLA, *Petitioner,*

vs.

MARINE COOKS & STEWARDS UNION, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR MARINE COOKS & STEWARDS UNION, AFFILIATED WITH SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, IN OPPOSITION

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OPINION BELOW

The Judgment and Opinion of the Court of Appeals was entered on September 13, 1971, and is reported in 448 F.2d 729. It is attached as Appendix 1 to petitioner's petition for the issuance of a writ of certiorari herein.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Was petitioner's motion for relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure, a substitute for an appeal under Federal Rules of Appellate Procedure, 3(a) and 4(a), when the time within which to appeal had long expired at the time relief under FRCP Rule 60(b)(6) was sought?

2. Assuming arguendo that in the circumstances of this case a motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure did lie was the affirmance by the Court of Appeals of the denial of relief by the District Court wrong in the absence of a clear showing that the District Court abused its discretion, when it denied the relief sought by the petitioner?

3. Had the petitioner established the existence of such extraordinary circumstances, so as to bring himself within the limited area of Rule 60(b)(6), to excuse his failure to prosecute an appeal under Federal Rules of Appellate Procedure, 3(a) and 4(a)?

STATUTE AND RULES INVOLVED

Federal Rules of Appellate Procedure 3(a) (attached as Appendix A) and 4(a) (attached as Appendix B) and Federal Rules of Civil Procedure, 60(b), (b)(1), and (b)(6) (attached as Appendix C).

STATEMENT

The Court of Appeals, in affirming the District Court, said:

> "The district court, following a hearing, dismissed this action for plaintiff's failure to comply with several orders of the court relating to pretrial matters. These orders were based upon various of the Federal Rules of Civil Procedure and local court rules. *Plaintiff did not appeal nor pursue any procedure to reinstate the cause until some five months after the dismissal* when he filed a motion ostensibly under Rule 60(b)(6) Fed. R. Civ. P., to be relieved of the judgment. The district court denied him relief, hence this appeal." (Petitioner's Appendix 1). (Emphasis added).

Appended hereto as Appendix D is the District Court's judgment and order from which petitioner appealed. The events leading to the dismissal of the lawsuit by the District Court are so completely reviewed therein, so as to obviate a repetition of the facts therein stated.

ARGUMENT

Having failed to duly appeal from the District Court judgment petitioner's motion seeking relief in the District Court pursuant to Rule 60(b)(6) was one which, by the requirements of that Rule, had to be made within a reasonable time. The judgment (Appendix D) was entered on September 25, 1968. The time to appeal from the judgment expired on October

26, 1968. No appeal was taken from that judgment. Instead, as found by the Court of Appeals, *five months had elapsed*, before petitioner moved for relief "ostensibly under Rule 60(b)(6) Fed. R. Civ. P". (Respondent's Appendix 1).

The complete record of the District Court, which was before the Court of Appeals, conclusively shows that this is not a case for the granting of a writ of certiorari.

The petitioner's so-called "Statement of the Case" (petition, pp. 3-5) is general, incomplete and indeed misleading, when it is compared with the District Court's review of the facts before it leading to Order (Appendix D). The petitioner's gratuitous reference (top of page 5 of his petition) to the misfortune of his prior attorney is *nowhere* supported in the record. Even if true, it is totally irrelevant.

Upon the facts herein, the Court of Appeals well stated the reasons why petitioner must fail in this Court, by saying that:

> "In order to bring himself within the limited area of Rule 60(b)(6) a petitioner is required to establish the existence of extraordinary circumstances which prevented or rendered him unable to prosecute an appeal. *Klapprott v. United States*, 335 U.S. 601 (1949); *Ackermann v. United States*, 340 U.S. 193 (1950). Plaintiff made no such showing.
>
> Nor does the record reveal facts, or any fact, which would tend to show that plaintiff's failure to seek review was due to "excusable neglect," a ground for relief under Rule 60(b)(1). To the

contrary, it discloses plaintiff's entire lack of diligence and attention to the matter.

60(b) motions are addressed to the sound discretion of the district court. *Title v. United States,* 263 F.2d 28 (9th Cir. 1959). As indicated above, denial of plaintiff's motion was well within that court's discretion." (Petitioner's Appendix 1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
February 10, 1972.

Respectfully submitted,
JAY A. DARWIN,
DARWIN & RIORDAN,
Attorneys for Marine Cooks & Stewards Union, affiliated with Seafarers International Union of North America, AFL-CIO.

(Appendices Follow)

Appendix A

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3. Appeal as of Right—How Taken.

(a) FILING THE NOTICE OF APPEAL. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

Appendix B

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of Right—When Taken

(a) APPEALS IN CIVIL CASES. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under

Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motions for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Appendix C

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60. Relief from Judgment or Order

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . ; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Appendix D

United States District Court
Central District of California

Consolidated Cases No. 67-1671-HP, No. 67-1672-HP

Christopher Martella, Plaintiff,

vs.

Marine Cooks & Stewards Union, et al., Defendants.

Memorandum of Decision and Order on Dismissal

The relevant events which form the basis of this Order are the following:

On February 2, 1968, defendant, Matson Navigation Company, filed and served interrogatories to the plaintiff. Rule 33 of the Federal Rules of Civil Procedure provides that interrogatories shall be answered within 45 days unless a different time is set by the Court.

By stipulation and order the pre-trial conference first scheduled for March 11, 1968, was continued to May 6, 1968, "to permit completion of all intended discovery procedures." In connection with said pre-trial conference plaintiff failed to file a Memorandum of Contentions of Fact and Law as required by Local Rule 9(e). Moreover, by that time plaintiff had not yet answered the said interrogatories; thereby in-

peding defendants' discovery efforts. Counsel for plaintiff offered no acceptable excuse or explanation, but did assure the Court and the attorneys for defendants that the answers to the interrogatories would be completed without further delay. The Court ordered that the pre-trial conference be continued to August 26, 1968, with no further continuances to be allowed to plaintiff. The Court also ordered plaintiff's counsel to prepare and file an order consolidating the two cases.

On June 7, 1968, the Court Clerk sent a letter to plaintiff's counsel calling his attention to the fact that he had not filed the order of consolidation. Again on August 7, 1968, the Clerk sent another letter to plaintiff's counsel, calling his attention to the fact that he had not filed said order of consolidation. This letter further directed counsel's attention to the fact that under Local Rule 9(e) plaintiff was required to file a Memorandum of Contentions of Fact and Law by August 12, 1968. The Clerk warned that further noncompliance with the orders of this Court could result in dismissal pursuant to Local Rule 28.

On August 26, 1968, the date of the re-scheduled pre-trial conference, the Court heard defendants' motion to dismiss for plaintiff's failure to answer the interrogatories and to comply with Local Rule 9 and for plaintiff's failure to prosecute. Again plaintiff's counsel had filed nothing and was unprepared. Although the Court had expressly stated to plaintiff's counsel on May 6th that there would be no further continuances given to plaintiff and plaintiff had been

given over three months to comply with both the Local and Federal Rules, plaintiff's counsel once again asked for a continuance. He stated in the presence of his client, Mr. Martella, who was in the courtroom: "I would guarantee that within the next week and a half or two weeks if the request of Court and counsel has not been complied with that such an order [dismissal] should be made as requested here." Relying on this assurance by counsel and trying to avoid imposing the sanction of dismissal on plaintiff, the Court asked Mr. Martella if he understood that if he or his counsel did not comply with the Court's order as to five matters within two weeks then the two law suits would be dismissed. Mr. Martella acknowledged that he understood the consequences if he failed to comply with this final extension of time by the Court. The Court ended the hearing on August 26, 1968, by itemizing again to the plaintiff and plaintiff's counsel exactly what must be done before September 11, 1968. The Court then warned again, "And if those matters are not complied with, then the Court will grant the motion to dismiss."

In spite of this clear admonition and in spite of the assurance by plaintiff's counsel in the presence of the plaintiff that the Court's order was understood and dismissal would be proper if the order was not complied with, plaintiff failed to comply fully with the Court's order in that plaintiff failed to prepare and file a Memorandum of Contentions of Fact and Law.

By Rule 37(d) and Rule 41(b) of the Federal Rules of Civil Procedure and by Local Rule 28, this Court

had authority to dismiss plaintiff's complaint on August 26, 1968, when plaintiff failed to answer the interrogatories and failed to prepare a Memorandum of Contentions of Fact and Law pursuant to Local Rule 9(c). With good cause, defendants moved and argued for a dismissal, but this Court stated at that time that it did not want to penalize a party because of his attorney. Rather than grant defendants' Motion to Dismiss, the Court accepted the offer of plaintiff's counsel that if the Court would give plaintiff one more chance to comply with the Rules, plaintiff would either fully comply or would accept a dismissal. This Court has therefore tried to be fair to all the parties and has tried to avoid the harsh result of dismissing what may be a meritorious claim because of failure to comply with procedural rules. But this Court must also consider the hardship on defendants and their attorneys in time and money spent by them on unnecessary delays, appearances, and travel between Los Angeles and San Francisco. It does not seem to this Court to be unfair to dismiss plaintiff's claim after plaintiff and plaintiff's counsel were given a final, explicit warning, and they agreed, that if specified rules were not complied with then the cases would be dismissed. In order to promote and maintain an efficient judicial process, it is necessary that the rules and orders of the Court be respected by those who call upon this Court for relief.

Therefore, the Motions of Defendant Marine Cooks & Stewards Union in Action No. 67-1672-HP and of Defendant Matson Navigation Company in Action No.

67-1671-HP having duly and regularly come on for hearing, and having been duly presented, for an Order in the consolidated cases dismissing these actions pursuant to Rules 37(d) and 41(b) of the Federal Rules of Civil Procedure, and pursuant to Rule 28(b) of the Rules of this Court, which Motions are based upon the pleadings heretofore filed and upon all of the proceedings heretofore had herein, and the Court being fully advised in the matter,

It Is Hereby Ordered, Adjudged and Decreed that the Motion of said Defendant Marine Cooks & Stewards Union in Action No. 67-1672-HP, and the Motion of Defendant Matson Navigation Company in Action No. 67-1671-HP be, and they hereby are granted, and the actions in the consolidated cases bearing No. 67-1671-HP and No. 67-1672-HP are hereby dismissed with prejudice.

It Is Further Ordered that the Clerk of the Court shall this day serve copies of this Memorandum of Decision and Order on Dismissal, by United States mail, upon the attorneys of record for the parties appearing in this cause.

Dated: September 24, 1968.

Harry Pregerson
United States District Judge